IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 17, 2004

STATE OF TENNESSEE v. TAMMY CHEAK TRENT

Appeal from the Circuit Court for Cocke County
No. 8738 Ben W. Hooper II, Judge

No. E2003-01726-CCA-R3-CD - Filed October 20, 2004

The Appellant, Tammy Cheak Trent, appeals the sentencing decision of the Cocke County Circuit Court. Under the terms of a plea agreement, Trent entered a best interest plea to the class E felony of accessory after the fact and received an agreed one-year sentence. Following a sentencing hearing, the trial court sentenced Trent to one-year confinement in the Department of Correction. Trent appeals arguing that (1) the trial court's sentence of confinement is in conflict with applicable sentencing principles and (2) the procedures employed by the trial court at the sentencing hearing "compelled [Trent] to involuntarily become a witness against herself." Finding merit to these contentions, we modify Trent's sentence to reflect a split-confinement sentence of one year with service of thirty days in confinement followed by supervised probation.

Tenn. R. App. P. 3; Judgment of the Circuit Court Modified

DAVID G. HAYES, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ALAN E. GLENN, JJ., joined.

Barry H. Valentine, Newport, Tennessee, for the Appellant, Tammy Cheak Trent.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Renee W. Turner, Assistant Attorney General; Al Schmutzer, Jr., District Attorney General; and James B. Dunn, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Procedural History

Under the terms of the plea agreement, the Appellant entered a best interest plea to accessory after the fact, pursuant to Tennessee Code Annotated section 39-11-411(a)(2) (2003) and, in exchange received a one-year sentence. At the guilty plea hearing, the State and Appellant agreed that the following proof would have been established at trial: "On 11/11/01 when Roger Murr shot and killed Anthony Lynn Turner this [Appellant] did assist Ms. Mary Michelle Murr Turner with

cleaning up afterwards, with patching holes and throwing away the masking tape that was used in that."[1] The co-defendant, Mary Michelle Murr Turner, also pled guilty on this date and received a one-year sentence. As provided by the plea agreements, the trial court ordered that a consolidated sentencing hearing be held to determine the respective manner of service of the sentences.

At the sentencing hearing, the State announced that it would offer no proof, relying instead upon the presentence report and the facts stipulated to at the guilty plea hearing. In its opening remarks, the prosecutor asserted that Turner was the leader in the commission of the offense of accessory after the fact and that both "cleaned up and covered up evidence." Although the Appellant chose not to testify at the sentencing hearing, Turner advised the trial court that she wished to testify.

After reviewing the presentence report, the trial judge informed the prosecutor that he wanted more "details" of the crime beside that which the Appellant related to the presentence officer. The State then summoned Robert Caldwell, an investigator with the Cocke County Sheriff's Department.

Caldwell's direct examination by the State began with his investigation into the murder of the victim and eventually led to the Appellant and Turner's involvement as accessories after the fact. Investigator Caldwell testified that law enforcement officials observed several bullet holes in the walls, which had been patched with tape, and noted that the back porch had been cleaned. The officers discovered the Appellant's fingerprints on the tape covering the bullet holes. Although neither the Appellant nor Turner mentioned cleaning the porch in their statements to the Tennessee Bureau of Investigation (TBI), officers discovered blood underneath the porch, which had dripped through the cracks. *State v. Mary Murr Turner*, No. E2004-00225-CCA-R3-CD, (Tenn. Crim. App. at Knoxville, June 14, 2004).

After direct examination was concluded by the State, the trial judge pursued his own examination of Caldwell regarding the details of the murder and the Appellant and Turner's involvement as accessories. Ultimately, the trial judge instructed the prosecutor to deliver to Caldwell a copy of the Appellant's statement to TBI Agent A. R. McCall and directed Caldwell to "tell me what you think of that statement." After reviewing the statement, Caldwell advised the court, "There's no way that you could be in the house with at least 11 shots fired and not hear the shooting." Apparently disturbed by this apparent inconsistency, the trial judge began questioning the Appellant, in the courtroom.[2]

THE COURT: Ms. Trent –

DEFENDANT TRENT: Yes.

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[1] As the proof will later develop, Roger Murr was the half brother of Mary Murr Turner and the boyfriend of the Appellant. Mary Murr Turner and the victim were married but estranged at the time of the homicide, which occurred at the marital residence.

[2] The record suggests that the witness Caldwell remained on the stand while the trial judge examined the unsworn Appellant.

THE COURT: – what did you do to help cover this crime up?

DEFENDANT TRENT: Your Honor, the only thing that I do know is when we were on our way to make our statements she had gave me a wad – it looked like a wad of paper and I throwed it out for her. I didn't know exactly what it was till after I had throwed it out, and she told me it was tape, that she had taped a window up.

THE COURT: Did you help tape anything up?

DEFENDANT TRENT: No, sir.

THE COURT: Now, they said they found your fingerprints on tape; right?

DEFENDANT TRENT: They didn't say anything to me.

THE COURT: Well, I'm just telling you what they said. I'm going to ask you again. Did you tape any holes up?

DEFENDANT TRENT: No, sir.

THE COURT: Did you see anybody tape any holes up?

DEFENDANT TRENT: No, sir.

THE COURT: Did you mop up or clean up anything on the back porch?

DEFENDANT TRENT: No, sir.

THE COURT: Who did that, then?

DEFENDANT TRENT: I really don't know.

THE COURT: Well, now, wait a minute. If it was done, who was there that could have done it?

DEFENDANT TRENT: When we come out of the bedroom, he was leaving.

THE COURT: "He," Roger?

DEFENDANT TRENT: Yes. He – I reckon it was him. They were going out of the driveway. He had knocked on the bedroom door and told us they were leaving. And I assume that he was with Tony. I did not know that Tony was dead at the time.

THE COURT: And you say you didn't hear any gunshot?

DEFENDANT TRENT: No, sir.

THE COURT: Well, in your statement you said you heard what sounded like firecrackers.

DEFENDANT TRENT: A. R. McCall asked me had I heard sounds that sounded like fireworks. And at the time, Your Honor, I was really almost in the state of shock because I didn't believe that this had even happened.

THE COURT: So you never saw the body of the victim?

DEFENDANT TRENT: No, sir.

The Appellant's attorney then cross examined Caldwell.

Co-defendant Turner next testified as a witness on her own behalf. Turner stated that she considered the Appellant "a sister" and that the Appellant had been living with her for about two days prior to the shooting. Turner further testified she and the victim were married for ten years and had three children. Turner described the victim as physically and verbally abusive. As a result of the victim's abusive behavior during the marriage, she suffered from a broken hand, back injuries, and head injuries, which resulted in organic brain damage. Turner stated she takes medication to treat seizures caused by her head injuries.

She testified that, on the day prior to the incident, she and the victim argued, and the victim struck her and left the residence. On the following day, the victim called her and informed her that he was coming to her residence to retrieve his possessions. Turner stated she subsequently called Murr and told him that the victim had threatened her and her children and that the victim was coming to her residence. Murr agreed to speak to the victim. Turner stated "evidently" the victim was killed on this occasion. *Mary Murr Turner*, No. E2004-00225-CCA-R3-CD.

Turner testified that she did not make any efforts to conceal a crime and that she was unaware that a crime had been committed. She acknowledged that she gave a roll of duct tape to the Appellant to discard in order to protect her brother.

The trial court proceeded in conducting its examination of Turner. During this examination, Turner denied that she "ever fixed a hole." The trial court then attempted to impeach Turner by reading to her the Appellant's statement to the TBI, "I helped Michelle fix some of the holes, the one behind the bedroom door, at the bedroom door, and the back door." Turner again advised the trial court, "I didn't help fix the holes, sir." The trial court abruptly discontinued examination of Turner and returned to the Appellant with the question, "Well, Ms. Trent, were you lying?" A colloquy

followed with the Appellant again denying that she "fix[ed] any holes." At this point, the trial court advised that the proceedings were being suspended, so that the court could hear from Agent McCall.

As did Investigator Caldwell, Agent McCall detailed at the sentencing hearing the findings of his investigation into the death of the victim. The details, which were essentially non-relevant to the sentencing hearing, involved various diagrams of the crime scene with references to bullet holes, the autopsy report, numerous laboratory reports, types of weapons, number of bullet casings recovered, time of death of the victim, location of the victim at death, statements of neighboring witnesses, fingerprint evidence, and the statements of the Appellant and Turner as provided to Agent McCall. With regard to these statements, McCall admitted that neither woman was *Mirandized* prior to making their statements.[3] Additionally, McCall acknowledged that "Murr admitted that he tried to patch the holes up himself" and "used a water hose to clean the blood off the back porch."

At the conclusion of the sentencing hearing, the trial court imposed a sentence of total confinement for the Appellant and Turner. In so doing, the trial court announced the following findings:

> [T]here's a whole slew of possible mitigating factors that the court kind of had in mind early on in reviewing these files that certainly kind of far outweighed the enhancement factors. And I guess at that point in time probation was really kind of on the front burner. . . .
>
> But today's hearing has really taken a turn that was really unexpected to me. . . .
>
> . . . [T]heir credibility has been reduced to almost zero. . . .
>
> What do I do at a sentencing hearing when that occurs? Well, I'm going to weigh that. And quite frankly, ladies, it has been weighed against you. I sentence you to one year in the Tennessee Department of Correction as Range I offenders. I do not find that you in any way are now presumed to be entitled to any probation because of the record that has been made here today.

[3] At the sentencing hearing, trial counsel for the Appellant and Turner expressed concerns that the hearing had been transformed into a "jury trial" and that had they known this fact in advance, they could have filed motions to suppress evidence utilized by the trial court in its examination of their clients. We would agree that at the sentencing hearing, "[t]he rules of evidence shall apply, except that reliable hearsay including, but not limited to, certified copies of convictions or documents, may be admitted if the opposing party is accorded a fair opportunity to rebut any hearsay evidence so admitted; provided, that this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or of Tennessee." Tenn. Code Ann. § 40-35-209(b) (2003).

ANALYSIS

The Appellant argues that the trial court erred in imposing a sentence of total confinement. Specifically, the Appellant contends that the trial court's examination of her "amounted to a trial during the sentencing hearing and compelled [her] to involuntarily become a witness against herself in violation of the Fifth Amendment of the United States Constitution and Article 1, Section 9, of the Tennessee Constitution."[4]

While this issue appears to be one of first impression in this State, we find guidance in the United States Supreme Court's decision in *Mitchell v. United States*, 526 U.S. 314 , 119 S. Ct. 1307 (1999). In *Mitchell*, the Court held that neither the defendant's guilty plea nor her statements at the plea colloquy functioned as a waiver of her right to remain silent at sentencing, and the sentencing court could not draw an adverse inference from the defendant's silence in determining the facts relating to the circumstances and details of the crime. *Id.* at 316-17, 1309. The facts in *Mitchell* are similar to the facts in this case. In *Mitchell*, the defendant, without any plea agreement, pled guilty to four counts of distributing cocaine. She put on no evidence at sentencing nor did she testify to rebut the government's evidence about drug quantity. Testimony of the co-defendants placed the amount of cocaine sold over the 5-kilogram threshold, thus mandating a minimum sentence of ten years. One of the things persuading the court to rely on the testimony of the co-defendants was that the defendant did not testify to the contrary. The district judge told the defendant, "I held it against you that you didn't come forward today and tell me that you really only did this a couple of times." *Id*. at 319, 1311. The Supreme Court reversed and remanded.

"Treating a guilty plea as a waiver of the privilege at sentencing would be a grave encroachment on the rights of defendants." *Id*. at 324, 1313. "We reject the position that either petitioner's guilty plea or her statements at the plea colloquy functioned as a waiver of her right to remain silent at sentencing." *Id*. at 325, 1313. Any effort by the State to compel the defendant to testify against her will at the sentencing hearing clearly would contravene the fifth amendment. *Id*. at 326, 1314; *Estelle v. Smith*, 451 U.S. 454, 463, 101 S. Ct. 1866, 1873 (1981). "The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" *Estelle*, 451 U.S. at 462, 101 S. Ct. at 1872 (quoting *Culombe v. Connecticut*, 367 U. S. 568, 581-82, 81 S. Ct. 1860, 1867 (1961)). Ours is an

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[4] We question whether the Appellant was ever a witness in this case. A witness is defined as "a person whose statements and declarations under oath are received as evidence for some purpose, whether such statements are made on oral examination or by deposition or affidavit." 81 *Am. Jur.* 2d *Witnesses* § 1 (1992). Our rules of evidence require that before testifying, every witness must be administered an oath or affirmation. *See* Tenn. R. Evid. 603.

Because a defendant in a criminal case cannot be compelled to give evidence against themselves, it is only when the defendant voluntarily chooses to testify that the defendant becomes a witness. As argued on appeal, the Appellant in this case chose not to testify at the sentencing hearing. We are not convinced that simply because the Appellant responded to questions by the trial judge that this fact qualified the Appellant as a competent witness. However, in the present case, the issue is not dispositive and, thus, is unnecessary to decide at this time.

accusatorial and not an inquisitorial system. *Mitchell*, 526 U.S. at 325, 119 S. Ct. at 1313 (quoting *Rogers v. Richmond*, 365 U.S. 534, 541, 81 S. Ct. 735, 739 (1961)). Importantly, however, *Mitchell* observed that a witness:

> may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details. The privilege is waived for the matters to which the witness testifies, and the scope of the waiver is determined by the scope of relevant cross-examination. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry.

Id. at 321, 1311-12 (internal citations omitted).

The Supreme Court in *Mitchell* applied to the sentencing phase the rule in criminal cases that no negative inference from the defendant's failure to testify is permitted. *Id.* at 327-28, 1314-15. Nonetheless, the Supreme Court has held that the Fifth Amendment privilege against self-incrimination is not self-executing; an individual must claim the privilege against self-incrimination in response to specific questions if he desires the protection of the privilege. *Roberts v. United States*, 445 U.S. 552, 559, 100 S. Ct. 1358, 1364 (1980). That rule, however, is subject to exception when some coercive factor prevents an individual from claiming the privilege or impairs his choice to remain silent. *Id*. at 560 n.6, 1364 n.6.

In determining whether sentencing was improperly influenced by a defendant's failure to admit guilt, courts have focused upon three factors: (1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe. *People v. Wesley*, 411 N.W.2d 159, 162 (Mich. 1987), *cert. denied sub nom. Wesley v. Michigan*, 484 U.S. 967, 108 S. Ct. 459 (1987); *see also Roberts*, 445 U.S. at 560 n.6; 100 S. Ct. at 1364 n.6; *People v. Swank*, 800 N.E.2d 864,871 (Ill. App. Ct. 2003). If there is an indication of these three factors, then the sentence was likely to have been improperly influenced by a defendant's persistence in his innocence. *Wesley*, 411 N.W.2d at 162.

In this case we find all three factors present. As previously noted, the Appellant's plea in this case was a best interest or *Alford* plea to facts stipulated to by the State. Following the State's recitation of the facts at the guilty plea hearing, the following colloquy transpired:

> THE COURT: Okay. Ms. Trent, had you gone to trial is that what you would have expected the State's proof to have been?
>
> DEFENDANT TRENT: I expect that's what they would have tried to prove.
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> THE COURT: Right. I'm not asking you to agree with it.
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> DEFENDANT TRENT: No.

THE COURT: But that's what they would be saying?

DEFENDANT TRENT: Right.

Thus, it is clear from the record that the Appellant never intended to admit any guilt in the crime, but was pleading guilty as she had "intelligently concluded that [her] best interests require[d] a guilty plea." *Dortch v. State*, 705 S.W.2d 687, 688 (Tenn. Crim. App. 1985). A best interest plea does not require a defendant admit his guilt. *See generally North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970).[5] Moreover, we would note that this court in *State v. Gautney*, 607 S.W.2d 907, 910 (Tenn. Crim. App. 1980), observed, "We know of no rule in this State requiring a defendant to admit his guilt in order to seek probation."

Next, the Appellant chose not to testify at the sentencing hearing. Nonetheless, the trial court wanted more "details" of the crime. Upon the trial court's request, two witnesses were called to relate the details surrounding the events. Moreover, the trial court questioned the Appellant, Turner, and the witnesses at length about the facts of the crime. Accordingly, we conclude the trial court fervently attempted to persuade the Appellant to admit her guilt.

Finally, the record is clear that, if the Appellant affirmatively admitted guilt, her sentence would not have been so severe. The trial court acknowledged that, before the Appellant's responses at the hearing, "probation was really kind of on the front burner." At the conclusion of the hearing, the court noted, however, "I do not find that you in any way are now presumed to be entitled to any probation because of the record that has been made here today." The Appellant was placed in a "catch-22;" in order to obtain leniency from the court following her best interest plea, she was required to admit to facts which she had steadfastly contested and which were well beyond the scope of the stipulated facts. The trial court's "coercive actions were sufficient 'to deny the individual free choice to admit, to deny, or to refuse to answer.'" *Swank*, 800 N.E.2d at 871 (quoting *Garner v. United States*, 424 U.S. 648, 657, 96 S. Ct. 1178, 1183 (1976)).

Accordingly, we conclude that the trial court's finding of "almost zero credibility" by the Appellant was improperly considered in the sentencing determination.[6] Because we find that the trial court misapplied the principles of sentencing, the presumption of correctness is not afforded. Tenn.

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[5] As previously noted by a panel of this Court, "[w]hen a trial court exercises its discretion to accept an *Alford* plea, we question its use of the defendant's mere assertion of innocence at the time of the plea as a basis for denying diversion or probation because of a lack of amenability to correction. However, the trial court need not ignore the evidence, including the defendant's testimony at the sentencing hearing." *See State v. William Blaine Campbell*, No. E1999-02208-CCA-R3-CD (Tenn. Crim. App. at Knoxville, Sept. 29, 2000), *perm. to appeal denied*, (Tenn. 2001) (citing *State v. Andrew H. Leone*, No. 02C01-9206-CR-00148 (Tenn. Crim. App. at Jackson, Sept. 29, 1993).

[6] At this juncture, we find it necessary to distinguish the Appellant's case from that of her co-defendant Mary Michelle Murr Turner, whose sentence of total confinement was affirmed by this court on direct appeal. *Mary Murr Turner*, No. E2004-00225-CCA-R3-CD. Turner voluntarily chose to testify at the sentencing hearing and, thus, she placed her credibility at issue. Moreover, Turner did not enter a best interest plea.

Code Ann. § 40-35-401(d) (2003). Accordingly, our review of the challenged sentence is *de novo* on the record.

The Appellant was convicted of a class E felony and is therefore entitled to the presumption that she is a favorable candidate for alternative sentencing. Tenn. Code Ann. § 40-35-102(6) (2003). However, although a defendant may be presumed to be a favorable candidate for alternative sentencing, the defendant has the burden of establishing suitability for total probation. Tenn. Code Ann. § 40-35-303(b) (2003); *State v. Boggs*, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). Even though probation must be automatically considered, "the defendant is not automatically entitled to probation as a matter of law." Tenn. Code Ann. § 40-35-303(b), Sentencing Commission Comments; *State v. Hartley*, 818 S.W.2d 370, 373 (Tenn. Crim. App. 1991). In determining whether to grant or deny probation, a trial court should consider the circumstances of the offense, the defendant's criminal record, the defendant's social history and present condition, the need for deterrence, and the best interest of the defendant and the public. *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Boyd*, 925 S.W.2d 237, 244 (Tenn. Crim. App. 1995).

Our sentencing act directs that, before a sentence of total confinement is imposed, the trial court is required to find one of the following considerations:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Tenn. Code Ann. § 40-35-103(1) (2003). The record demonstrates that none of the above factors were considered; rather, the trial court ordered total confinement based upon the Appellant's lack of credibility. This court has observed that, while candor is relevant in determining the potential for rehabilitation, absent other factors, untruthfulness to the court will not *per se* warrant a denial of all alternative sentencing. *State v. Kevin S. Phillips*, No. 03C01-9801-CR-0024 (Tenn. Crim. App. at Knoxville, Mar. 12, 1999), *perm. to appeal denied*, (Tenn. 1999). It is clear from the plain language of Tennessee Code Annotated section 40-35-103 that the "untruthfulness of the defendant is relevant in determining the sentence alternative and not as authority to deny all forms of alternatives to incarceration." *Id.* (emphasis added).

The presentence report reflects that, on March 30, 1995, the Appellant was convicted of two felonies, food stamp fraud and AFDC fraud. Following these convictions, the Appellant successfully completed probation and placement in the Community Corrections Program. In 2001, she received

a misdemeanor conviction for unlawful possession of exotic animals. For this crime, the Appellant was assessed a fine, which she paid in full.

The Appellant is a forty-two-year-old single person. She states that she suffers from depression and is currently taking mediation for this condition. The presentence report reveals that she dropped out of high school in the eleventh grade; however, she returned and received her G.E.D.

Based upon the Appellant's prior criminal history, we conclude upon *de novo* review of the record that a sentence of split confinement would both serve the ends of justice and fulfill the rehabilitative needs of the Appellant. Accordingly, the Appellant's sentence of one year is modified to reflect that she will be required to serve thirty days in jail followed by supervised probation. The case is remanded for entry of a judgment consistent with this opinion and for imposition of other conditions and terms of supervision the trial court deems appropriate, as defined by Tennessee Code Annotated section 40-35-303.

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DAVID G. HAYES, JUDGE